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OCTOBER TERM, 1991

WILLIAM P. BARR, Attorney General of the United States, et al.,
Petitioners,

vs.

JENNY LISETTE FLORES, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the INS's interest in refusing to evaluate the suitability of available custodians to care for a given minor justifies indefinitely abridging that minor's liberty interest in freedom from physical restraint.

2. Whether the automatic, indefinite detention of children denies them due process of law in violation of the Fifth Amendment to the United States Constitution because such detention is never determined to be in a given child's best interests or to further any other substantial governmental interest.

3. Whether automatic, indefinite detention of children solely to promote child welfare violates the Immigration and Nationality Act, 8 U.S.C. §§ 1101, *et seq*.

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CASES

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-905

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

v.

JENNY LISETTE FLORES, ET AL. RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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BRIEF FOR THE RESPONDENTS

STATEMENT

1. This case asks the Court to decide whether, under the statutes and Constitution of the United States, a child may be incarcerated as a matter of course in order to save an administrative agency from deciding whether detention actually serves any important interest.

Established child welfare standards—including those prescribed by Congress and state governments for the release of minors—unanimously declare that

minors should not be held in custody unless detention is determined necessary to protect a given child or the community, and for years petitioner Immigration and Naturalization Service (INS) released minors under such a policy with unblemished success.

Since 1984, however, the agency has sought to incarcerate all children *automatically* until and unless a close blood relative comes for them. The agency refuses any effort to determine whether a child may be released safely to other responsible adults, preferring to incarcerate children indefinitely without ever considering the actual need to do so or having that detention reviewed by anyone, much less a neutral decisionmaker.

The INS defends this approach solely on the ground that routine, open-ended detention somehow "protects" children. The agency admits that its policy has nothing to do with ensuring minors' availability for deportation proceedings or with any other purpose related to the admission or expulsion of aliens. The district court's order does nothing to impair the Immigration and Nationality Act or any policy regulating immigration. Neither the holding nor the rationale of the courts below allows a greater number of persons into this country or otherwise affects the Government's authority to determine the circumstances under which persons are admitted, excluded, or deported.

Importantly, the district court's order only protects children from *unnecessary* detention. The district court did *not* mandate release of any juvenile who is a flight risk, nor did it bar the INS from refusing to release a child it reasonably determines should remain in custody to protect the public or the minor. The policies and procedures used to implement the court's brief order were left entirely to the INS.

The INS answers that it lacks the resources and expertise to determine whether a child should or

should not be detained so it "errs" on the side of incarceration. This, however, is a constitutionally insufficient reason for the open-ended impairment of physical liberty. In any event the uncontroverted record shows that for years prior to 1984, and for nearly four years since the district court's order, the INS has released hundreds of minors to custodians not on the agency's approved list, and it has done so with not a single reported instance of abuse or neglect. In short, but for the district court's order the INS would have locked up hundreds of children while actually protecting none.

2. Pursuant to 8 U.S.C. § 1252, INS agents regularly arrest and detain minors for civil proceedings upon probable cause to believe they are present in the U.S. in violation of the INA. If not released on bond, they are confined until proceedings to determine their deportability are completed, a process that may take years. 2 Clerk's Record 10 ("CR").

INS practice until September, 1984, was to release minors on bond to their parents or other responsible adults who would care for them and assure their presence at future proceedings. 88 CR 72; 163 CR 1191; 162 CR 915; 163 CR 1201, 1207, 1213. This policy was consistent with well-established federal and local standards on the detention of minors, and no evidence indicates that it either was a burden on the agency or resulted in harm to any children. On September 6, 1984, then-INS Regional Commissioner Harold Ezell ended this practice in the Western Region with the following memorandum:

> No minor shall be released except to a parent or lawful guardian. This is necessary to assure that the minor's welfare and safety is [sic] maintained and that the agency is protected against possible legal liability.

> District Directors and Chief Patrol Agents are authorized, *in unusual and extraordinary cases,* to release a minor to a responsible individual who agrees to provide care and be responsible for the welfare and well being of the child.

3 CR 41 (emphasis supplied).

The INS's memorandum all but eliminated the discretion local officials had previously exercised to release minors. Not surprisingly, INS field officers simply *stopped* releasing children to anyone but a parent or guardian. *E.g.*, 161 CR 870-71.[1] Unlike its former procedure, the INS now refused to determine whether detention would actually be in a child's best interests. Nor did the agency provide procedures by which its initial, automatic detention orders could be regularly reviewed.[2]

For boys and girls without a close blood relative to come for them, the INS's blanket detention policy and post-detention procedural void meant certain incarceration. As a practical matter, few children have any real chance of obtaining a guardian: apart from being physically confined, children undergoing INS proceedings are entitled to neither guardians *ad litem* nor court-appointed counsel. Few are able to

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[1] Releasing minors needing medical care was, in fact, the *only* actual use of the "unusual and extraordinary" exception the agency ever managed to identify. Joint Appendix ("J.App.") at 7.

[2] Although INS regulations provide that evidence must be presented to an INS district director or designated subordinate "for a determination as to whether there is prima facie evidence" that a prisoner is deportable, 8 C.F.R. § 287.3, the INS has *no* procedure—whether before a district director, immigration judge, or anyone else—whereby *the cause for detaining* a child must be reviewed. The agency even lacks procedures by which to give children notice of the purportedly "protective" restrictions on their release. J.App. at 11.

afford retained counsel. The Los Angeles Superior Court has flatly declared children in INS detention *ineligible* for temporary guardians. J.App. at 27. Denied guardians, children have no option but to remain in INS jails. Under the new policy, children began spending up to a year in INS detention facilities. 160 CR 400.

On July 11, 1985 15-year-old Jenny Flores, 16-year-old Dominga Hernandez, 13-year-old Alma Cruz, and 16-year-old Ana Martinez, filed suit on behalf of themselves and all other children jailed solely because INS refused to release them to available responsible adults or relatives. 1 CR 4-5.[3]

Some two years later, the district court held that the INS's detention policy denied equal protection because the agency released minors in exclusion proceedings, but not in deportation proceedings, to their adult brothers, sisters, aunts and uncles, as well their parents and guardians.[4]

Despite this order, many children continued to endure indefinite detention because the INS refused to evaluate whether extended family members, adults who were not blood relatives, or even licensed

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[3] On July 19, 1985 Jenny and Dominga, still in jail because of the INS's newly restrictive policy, asked Senior District Judge Robert J. Kelleher to order their release. 5 CR. Judge Kelleher ordered the INS to free them to available responsible custodians. 10 CR.

[4] Remarkably, given its ostensible purpose, the INS's 1984 policy change did not apply to all children. The agency began applying a blanket detention policy only toward children arrested for *deportation* proceedings, while continuing to release minors undergoing *exclusion* proceedings to brothers, sisters, aunts and uncles as well. 8 C.F.R. § 212.5(a)(2)(ii) (1987). The district court reasoned there was no valid reason to deny children undergoing deportation proceedings similar treatment and ordered the INS to begin releasing all minors in accordance with its treatment of those in exclusion proceedings. 188 CR.

juvenile shelters were fit to care for them. On May 16, 1988, respondent children moved to require the INS to *resume* determining whether open-ended detention was reasonably necessary. The INS urged the court to delay ruling until new regulations governing the release of minors were issued, and the court agreed. CR 252.

The new regulations, however, continued the INS's policy of blanket detention. The only meaningful change was to add grandparents to the list of relatives to whom minors could be released. The regulations did not so much as permit release to licensed juvenile shelters or extended family members. There remained no relief for children who had no close blood relative in the United States willing to come for them.[5] Having considered the case for almost three years, the district court held that this policy denied children due process of law. 256 CR. The district court ordered INS to consider the release of children on an individualized basis, and left it to the agency to adopt the procedures it would follow in determining when release is warranted. The Ninth Circuit Court of Appeals, sitting *en banc*, affirmed. The facts compelling the district court's judgment and the court of appeals' affirmance are wholly uncontroverted.

a. For the first time in its history, the INS sought to exercise its detention authority for purposes having nothing to do with the Immigration and Nationality Act ("INA" or "Act"). Rather, its juvenile detention policy was promulgated strictly to promote *child welfare*. The INS stressed that the sole purpose for

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[5] Two of the four class representatives, including one freed by Judge Kelleher, Dominga Hernandez, would still have been jailed under the "new" regulations.

routinely confining children was to protect them and had nothing to do with ensuring their availability for deportation. J.App. at 11.[6]

b. Although it now assumes to protect children, the INS admits having no expertise in child welfare and that it failed to consult with anyone possessing such knowledge before changing its policy. 76 CR 56-57. The INS never assessed what impact the blanket detention policy would have on the time children spent in INS jails. J.App. at 9.

c. Nor was the change to a blanket detention policy motivated by any actual problem the INS had experienced under its prior policy. During the many years the INS had released children to responsible, if unrelated, adults, there was no reported case in which any minor had been harmed or neglected. J.App. at 9-10, 21-22.

The INS finally admitted having *no* evidence to support its notion that juveniles released to parents are less likely to be harmed or neglected than those released to other adults or child welfare organizations. The INS merely "*presume[d]* that harm or neglect will be less likely if a minor is in the custody of a person such as a parent or legal guardian ..." J.App. at 15 (emphasis supplied).

d. In contrast to the INS's approach, *all* recognized juvenile justice standards—those promulgated by the American Bar Association, the National Advisory Committee for Juvenile Justice and Delinquency Prevention, the National Conference of

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[6] The INS later admitted having *no* evidence that children released to close adult relatives are any more likely to appear for deportation than are minors released to other adults. 159 CR 39.

Commissioners on Uniform State Laws, the National Advisory Commission on Criminal Justice Standards and Goals, and the U.S. Department of Health, Education and Welfare, among others[7]— provide that children should only be detained upon a reasoned determination that confinement is strictly necessary. J.App. at 34 *et seq. Congress, too, joins this consensus*, mandating that federal magistrates release minors whenever possible to reputable adults regardless of blood relationship. 18 U.S.C. § 5034 *reprinted in* J.App. at 6 .

Modern child welfare practices recognize that routinely institutionalizing children endangers their mental health and progress toward productive adulthood. Long experience has verified the damage detention works upon children's ability to form close personal relationships, upon their social maturity, performance on intelligence and developmental tests, ability to function in non-institutional settings, and self-concept. North American Council on Adoptable Children, Research Brief #1, *Challenges to Child Welfare, Countering the Call for a Return to Orphanages* (November 1990) at 8-12; M. Wald, *et al.*, *Protecting Abused/Neglected Children, A Comparison of Home and Foster Placement* (Stanford Center for the Study of Youth Development, Stanford University, November 1985) at 10. At best, detention

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[7] U.S. Department of Health Education and Welfare, *Model Acts for Family Courts and State-Local Children's Programs* (1974); National Advisory Committee for Juvenile Justice and Delinquency Prevention, *Standards for the Administration of Juvenile Justice* (1982); National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* (1973); Institute of Judicial Administration/American Bar Association, *Standards Relating to Noncriminal Misbehavior* (1982), and *Standards Relating to Interim Status* (1982); National Conference of Commissioners on Uniform State Laws, *Uniform Juvenile Court Act* (1968).

creates "needless idleness, boredom, acute anxiety, fear, depression, and hostility. Idle, unattended confined children present special supervisory problems. They frequently become destructive and cause physical harm to each other, or their surroundings." *D.B. v. Tewksbury*, 545 F.Supp. 896, 904 (D. Ore. 1982).

e. The INS justifies its violation of sound child welfare practices by professing a lack of resources and expertise to determine whether an available adult is a fit custodian. As has been seen, however, until 1984 the INS routinely determined whether minors should be released to extended family members or other available custodians. *E.g.*, J.App. at 18 (Baltimore, policy to release juveniles to "parent, family member or a responsible adult"); J.App. at 20 (San Francisco, policy to release minors to "a responsible adult").

State officials familiar with guardianship proceedings, moreover, testified that determining whether an available adult is fit to care for a child who would otherwise be incarcerated is relatively straightforward: their screening adults seeking appointment as temporary guardians, for example, involves a brief personal interview and a sworn petition setting out the proposed guardian's qualifications. 163 CR at 1159-60.

Jailing children, meanwhile, is not without its own costs or demands for special expertise. The INS conceded having made *no* effort to determine whether it would be more cost-effective to evaluate available adults than it is to detain children at taxpayers' expense. 79 CR 1669-70. The agency admitted that detaining a child costs the U.S. taxpayer up to $100.00 per day per child. 159 CR 76.

f. The record further established that the INS lacks the expertise necessary to care for children during months of open-ended confinement. Though the agency represents that it keeps children in "special child-care facilities," Pet.Brf. at 2, juvenile justice expert Paul Demuro, who evaluated several of the INS's facilities, saw things differently:

> The El Centro facility is a converted migrant farm workers' barracks which has been secured through the use of fences and barbed wire ... At [the San Diego] facility each barracks is secured through the use of fences, barbed wire, automatic locks, observation areas, etc. In addition the entire residential complex is secured through the use of a high security fence (16-18'), barbed wire, and supervised by uniformed guards ....
>
> No facility had recreational or educational areas, equipment or materials meeting accepted standards for juvenile detention. In all four facilities, young children ate their meals with unrelated adults. The major activity at each facility is TV watching and lining up to make collect telephone calls.

163 CR 1277.[8]

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[8] The INS argues that it has reformed its detention camps and that the "deplorable conditions" existing at the time it adopted its blanket detention policy are now irrelevant. Pet.Brf. at 32 n.31 Respondents disagree. First, the INS supports its portrayal of current conditions not by reference to any record evidence, but by pointing to a partial settlement agreement in which the agency agreed to settle respondents' claims concerning education, reading materials, commingling, recreation and visitation. There is no evidence that these or other conditions have actually improved. To the contrary, nine non-profit organizations that work with immigrant and refugee children presented voluminous evidence of public record to the court of appeals showing that conditions in INS camps remain deplorable. Brief *Amicus Curiae* of Immigrant, Refugee and Civil Rights

(1) The record shows that the INS confines children in privately operated detention facilities or in

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Groups, March 1, 1991. These *amici* cite, *inter alia*, a recent state report on substandard conditions not raised in this lawsuit:

> A recent case of a twelve year old undocumented youth taken into immigration court in handcuffs and shackles reignited public interest in INS treatment of youth.... INS has no standards for children in detention and according to the children's own testimony, use of handcuffs is not uncommon in addition to arbitrary punishment, inadequate food, lack of access to counsel or phones. One youth who was subsequently sent to Juvenile Hall described the vast improvement over INS detention conditions.

California Legislature, Joint Committee on Refugee Resettlement, International Migration and Cooperative Development, *Joint Interim Hearing on Impact of INS Policies and Reforms* (July 19, 1990). This report was issued long after INS now claims it remedied the deplorable conditions in its detention facilities.

Second, whether detention is consistent with the purposes assigned for it is properly determined by reference to the time the detention scheme is put into place. *Cf. Hampton v. Mow Sun Wong*, 426 U.S. 88, 103-04 (1976) (purposes offered to justify policy must have actually motivated its adoption); *Califano v. Goldfarb*, 430 U.S. 199, 223 (1977) (Stevens, J., concurring) ("due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve [the] interest' put forward by the government as its justification"). Thus, belated improvements the INS made in its detention camps under the compulsion of this lawsuit cannot save a policy that was punitive and harmful *ab initio*.. *See* J.App. at 9 (INS never evaluated whether conditions in detention camps were appropriate for children jailed under blanket protective detention policy).

In any event, the INS's acknowledgment that it housed children under deplorable conditions confirms just how difficult it is to care for children in an institutional setting, a task far more arduous than determining whether a child should be released to an extended family member or other concerned adult.

detention halls for delinquents run by state and local governments. The treatment children receive in the private facilities depends on the terms of the facility's contract with the INS. Detention camp operators typically report having *nothing* in their contracts requiring any special treatment for children. *E.g.*, 77 CR 671. The vast majority of children have been held in facilities lacking any license or accreditation for juvenile care. *Id.* at 712, 719-20.

One result of this lack of standards is that facility operators regularly exercised unfettered authority to strip search children with or without adequate cause. 78 CR 1153-54.[9] Children in the INS's Laredo, Texas, "child care center" were strip searched because they visited with their attorneys, 78 CR 1153-54, purportedly to stop the lawyers from distributing literature soliciting clients. 76 CR 395.[10]

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[9] Although the INS would prefer to highlight its willingness to settle respondents' claims concerning certain jail conditions, the agency refused to halt arbitrary strip searches of children until ordered to do so by the district court. *See Flores v. Meese*, 681 F.Supp. 665 (C.D. Cal. 1988).

[10] Plaintiff Ana Martinez was sixteen years old when the INS incarcerated her in the Laredo facility. 79 CR 1265. On at least two occasions she was forcibly strip searched solely because she had seen her lawyer. *Id.* at 1294-96. Ana described her experience as follows:

> Q What happened after [your attorney] left?
> A They searched me and they undressed me very ugly.
> ...
> A She didn't touch me but she had me undress everything.
> Q Including your underwear?
> A Yes. I was very embarrassed. ...
> A Since I didn't want to undress, she told me — she obligated me and threatened me.

Id. at 1294-96.

(2) The INS has routinely exposed children to daily contact with unrelated adult detainees of both sexes. At the ECI facility at El Centro, young unaccompanied males have been mixed with adult women. 159 CR 351. Young unaccompanied girls have been housed with adult women. *Id.* at 352. Children and adults shared the same unpartitioned showers and toilets. *Id.* at 353.

Similar practices have prevailed at other facilities. At the Border Patrol Staging Facility near San Diego, California, unaccompanied children of "tender age" shared bedrooms with adult females. 160 CR 271. There were no physical barriers between the male and female sleeping areas at the contract facilities at Hollywood, 77 CR 686, or Inglewood, 160 CR 356-57.[11]

(3) Visitation policies at the detention facilities have also been inadequate. At the Casa San Juan facility in San Diego, California, the INS denied children any opportunity to visit with their family or friends. 163 CR 1070. At the Staging Area in San Diego, the INS never told children they could receive visitors. 160 CR 311. Not surprisingly, visits for children were "far and few between." *Id.* at 311. At the ECI facility in Inglewood, visits were limited to a single day per week, between the hours of 1-3 p.m. for thirty minutes, one visitor per child *if* staff felt it would not disrupt other duties. 159 CR 196-97; 160 CR 389, 392. Children had to request and complete an application form before being allowed a visit. *Id.* at 387.

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[11] On at least one occasion, a boy was sexually abused by a female adult while in an INS contract facility in Laredo, Texas. An INS official dismissed the incident as perhaps having been "consensual." 159 at 145-46.

(4) The INS also concedes that children have had access to few or no educational services or reading materials while in its "protective" custody. 159 CR 83-84. The agency admitted that seven of the twelve facilities in which minors were most often held provided youngsters *no* education whatsoever. Those facilities accounted for over 64 percent of all detained juveniles. 78 CR 1159.[12] The INS disavowed any obligation to provide children education. *Id.* at 80. As one official put it, "*It is not [an INS] function*. It would be costly." J.App. at 14 (emphasis supplied).

(5) Suitable recreation has also been persistently lacking at INS detention facilities. The director of one facility described "recreation" for children in stark terms: "Some of the little kids play in the dirt... Sometimes they go out there and let their tongue[s] hang out in the heat." J.App. at 26. During long periods of extremely hot weather, detainees at the ECI-El Centro facility have been let outdoors only at 7:00 a.m. or 7:00 p.m., for 20 or 25 minutes. *Id.* Providing children time outdoors was a low priority. *Id.*[13]

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[12] Reading materials have often similarly been unavailable. The Inglewood ECI facility purchased no books of any kind, and the only reading materials children had were those occasionally donated by concerned individuals. 160 CR 400

[13] At the Staging Facility in San Diego, even outdoor access is a mixed blessing: once a child goes outside, the INS may refuse to let him or her back in. Children have been forced to remain in the exercise yard the entire day without access to dormitories, toilets or drinking fountains. 160 CR 314-15. Not surprisingly, most children opt to spend the entire day indoors watching television. *Id.*

g. Responding to these undisputed facts, the district court ordered two things. First, the INS should not automatically deny release to responsible adults solely because they are not a minor's blood relative. The district court did not *mandate* release—it simply required that the INS determine whether *there are reasonable grounds not to release*.[14] As stated, the district court left it to the INS to develop policies and procedures to implement the brief order. Second, in those instances where INS denies release, a child's custody status should receive timely independent review.[15]

The court of appeals, sitting *en banc*, affirmed. As has been seen, the INS failed to produce *any* evidence that automatic restrictions on children's freedom protects them. On the other side of the equation, children's "'strong interest in liberty'" must freely be conceded. App. at 15a. Accordingly, the court of appeals held that, although the INS may "determine on the basis of the particular case whether release of the child poses a danger to the community or could result in harm to the child, the *blanket* refusal to make individualized determinations in the guise of

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[14] The district court's order requires the INS to release "any minor otherwise eligible for release to his parents, guardian, custodian, conservator, or other *responsible* adult party." App. at 146a (emphasis supplied). *A fortiori*, the agency need not release if it has any actual reason to believe that an available adult is not "responsible."

[15] Of course, nothing in the district court's order bars the INS from exercising discretion to deny release to persons it deems unable to care for a child or produce him or her for deportation proceedings. Similarly, nothing bars the INS from *preferring* one placement over another. The INS is therefore not required to determine the fitness of an individual custodian where placement in a licensed community shelter, foster care program, group home, or other suitable shelter is available.

administrative expediency cannot pass constitutional muster." *Id.* at 21a (emphasis supplied).

SUMMARY OF THE ARGUMENT

A

Under the Constitution of the United States, an individual's interest in freedom from physical restraint is the essence of liberty. A minor may not be deprived indefinitely of physical liberty unless that deprivation is justified by an important governmental interest and is narrowly tailored to minimize infringement on personal liberty. Because detention is generally *not* in a child's best interests, the INS's automatic incarceration policy serves only to save it from determining who is and who is not an appropriate custodian. This interest falls well short of a substantial or compelling governmental interest justifying open-ended confinement.

B

Existing INS procedures afford children *no* procedural protection against the needless deprivation of their personal liberty: the INS initially refuses to determine whether detention is actually in a child's best interests and then provides children no procedure by which that decision must be reviewed. A child's fundamental interest in physical liberty may not be denied unless the Government carries the burden of proving that detention is warranted. Constitutionally minimal procedures include an initial assessment of the need to detain a given child and, prior to an extended restraint on a child's liberty, neutral and detached review of his or her custody.

C

Whenever possible, a statute should be construed so as to avoid questions concerning its constitutionality. Construing the INA to permit automatic, open-ended confinement of children raises serious constitutional questions. The INS's detention policy exceeds its authority under the Immigration and Nationality Act, properly construed, because it imposes *automatic* detention, not detention pursuant to any actual exercise of discretion. This Court has repeatedly held that under the INA the INS must *exercise* discretion to detain in an individual case, and the agency here seeks to pursue a statutorily impermissible policy of blanket detention.

ARGUMENT

I ADMINISTRATIVE CONVENIENCE IN REFUSING TO EVALUATE THE NEED FOR OPEN-ENDED DETENTION CANNOT JUSTIFY ABRIDGING A MINOR'S FUNDAMENTAL RIGHT TO FREEDOM FROM PHYSICAL RESTRAINT.

The Due Process Clause of the Fifth Amendment both guarantees procedural fairness in connection with any governmental deprivation of liberty and "contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Foucha v. Louisiana*, _ U.S. _, 60 U.S.L.W. 4359, 4361 (1992). Official action that burdens fundamental constitutional rights must (1) serve an *important* governmental purpose, and (2) be *narrowly tailored* to minimize the infringement on individual liberty. *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 499 (1977); *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

The INS argues that the governmental interest in protecting children is compelling; respondents agree. Looking at this case from the standpoint of a *parens patriae* interest, however, the INS's policy is

anything but narrowly tailored to minimize infringement on children's personal liberty. Clearly, the INS's blanket detention policy sweeps broadly and needlessly across respondent children's freedom from physical restraint.

First, the Government does not argue, nor could it, that a child's welfare and safety are as a general matter better served by detention than by release to a safe, non-custodial environment. The INS has never disputed that sound child welfare practices, embodied in both federal and state law and practice, provide that a child's best interests are served by placement in a non-custodial setting. *See* 18 U.S.C. §§ 5032 *et seq.*; 42 U.S.C. §§ 627 and 671. Indeed, this fundamental principle of child welfare has been repeatedly recognized by this Court . *E.g.*, *Lehman v. Lycoming Co. Children's Services*, 458 U.S. 502 (1982).

Second, the Government never established, nor could it, that extended family members or other responsible adults are any more predisposed to harm children than are those immediate blood relative adults on the agency's approved list. Indeed, the agency admitted having *no* evidence that children released to adults appearing on its present list are any safer than those it previously released to other custodians. J.App. at 15.

Third, the Government concedes that procedures do exist to determine whether an adult is fit to care for a child who would otherwise be consigned to indefinite detention. The Government acknowledges that precisely such determinations are routinely and reliably made in a variety of settings. Pet. Br. 20, 28. Such determinations were regularly and successfully made by the agency until 1984, and have been regularly made since 1988 under the district court's order without incident.

Finally, nothing in the district court's order requires the INS to release a child where doing so would be contrary to a sound *parens patriae* interest. To this day, the INS is perfectly free to detain minors whenever doing so is warranted under the circumstances.

In reality, therefore, this case is patently *not* about the Government's interest in protecting children, but rather its interest in refusing to determine whether a child's welfare is furthered by detention. Hence, in the final analysis, this case has far less to do with protecting children than with enabling the INS to avoid the administrative inconvenience of determining whether detention would actually further any true *parens patriae* interest.

As a matter of constitutional law, such administrative inconvenience has never been held to justify the open-ended detention of children. or anyone else, for that matter. In any event, the uncontroverted record shows that determining cause for open-ended detention is both administratively feasible and imposes far fewer burdens on the INS's resources than does caring for children's physical, emotional, social, and developmental needs during months of custodial detention. Nothing in the INS's blanket detention policy warrants the open-ended deprivation of children's fundamental right to physical liberty.

A Respondent's interest in freedom from physical restraint is entitled to strong constitutional protection.

Detention, of course, is the very essence of a deprivation of liberty: "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action," and "commitment for any purpose constitutes a significant deprivation of liberty that

requires due process protection." *Foucha*, 60 U.S.L.W. at 4362.

> As incarceration of persons is the most common and one of the most feared instruments of state oppression and state indifference, we ought to acknowledge at the outset that freedom from this restraint is essential to the basic definition of liberty in the Fifth ... Amendment[].

Id. at 4365 (Kennedy, J., dissenting). Thus, this Court subjects "to *heightened* due process scrutiny, with regard to both *purpose* and *duration*, deprivations of physical liberty imposed before a judgment is rendered ..." *Id.* (emphasis added).[16]

Given this precedent, the INS largely concedes that its detention policy cannot withstand the heightened due process scrutiny to which deprivations of physical liberty are generally subjected. Accordingly, the INS offers that the Court should discount the protection physical liberty has heretofore received under our Constitution because respondents are minors, and incarcerating children should be seen not as depriving them of physical liberty, but as infringing upon a relatively unimportant "right to be released to an unrelated adult."

Under this Court's precedents, however, "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In Re Gault*, 387 U.S. 1, 13 (1967).

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[16] Clearly, nothing in this case asks the Court to "expand the concept of substantive due process," *Collins v. City of Harper Heights, Tex.*, 112 S.Ct. 1061, 1068 (1992) or to "discover new fundamental rights imbedded in the Due Process Clause," *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986). Respondents' claim is firmly rooted in the core meaning of "liberty" as explicitly guaranteed by the Constitution: that is, it is a right both "implicit in the concept of ordered liberty," and "deeply rooted in this Nation's history and tradition," *Bowers*, 478 U.S. at 191-192.

Respondents' interest in not being jailed needlessly is just as strong, if not stronger, than an adult's. *Parham v. J.R.*, 442 U.S. 584, 600 (1979).[17] Thus, this Court has never held that juveniles have generally diminished liberty interests such that government's incarcerating them fails to implicate an important constitutional right. Rather, the Court has held that a juvenile's interest in freedom from institutional restraint may "*in appropriate circumstances*, be subordinated to the State's *parens patriae* interest in preserving and promoting the welfare of the child." *Schall v. Martin*, 467 U.S. 253, 265 (1984) (emphasis added).

Distorting this principle in an effort to minimize the import of its detention policy, the INS suggests that children "are always in some form of custody" anyway, so that detaining a child is somehow less repugnant to the Constitution. Pet.Br. at 26. But the INS's view that open-ended detention impairs only a child's right to release to an unrelated adult stands the Constitution on its head. It is not up to the

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[17] The INS's highly theoretical approach, moreover, says nothing about the obvious and substantial differences between a parent's or other caregiver's custody of a child, and custody of a child that has never been determined to be in a child's best interests:

> It is difficult for an adult who has not been through the experience to realize the terror that engulfs a youngster the first time he loses his liberty and has to spend the night or several days or weeks in a cold impersonal cell or room away from home or family.

In re William M., 3 Cal.3d 16, 31 n.25, 89 Cal.Rptr. 33 (1970); *see also Lehman v. Lycoming County Children's Services*, 458 U.S. 502, 510-11 & n. 12 (1982) (distinguishing between children in the "custody" of parents or foster parents, who are "at liberty" and "suffer no unusual restraints not imposed on other children," and children "actually confined in a state institution").

individual to prove a right to release; it is up to government to justify detention. To define the right at issue here as one of "release to an unrelated adult" distorts respondents' claim. Respondents simply assert a right not to be detained without individually determined good and sufficient cause.

Schall, it must be appreciated, held that the range of governmental interests justifying restraints on liberty, in the case of children, includes a *parens patriae* interest in caring for and protecting those who "are not assumed to have the capacity to take care of themselves." 467 U.S. at 265. As this Court explained in *Bellotti v. Baird*, 443 U.S. 622, 635 (1979), "although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern ... sympathy, and ... paternal attention.'" The question remains, therefore, whether the INS's detention scheme in fact is narrowly tailored to serve a legitimate *parens patriae* interest.

B Blanket detention of children serves no legitimate governmental interest.

Though the INS at times argues otherwise, this case has little to do with government's interest in protecting children. Rather, respondents contend, and the INS largely concedes, that this detention scheme is really aimed at saving the agency the trouble of deciding whether incarceration would actually be in a child's best interests. Both as a matter of law and of fact, administrative convenience is a poor justification for the open-ended detention of children.

First, even where less important constitutional rights are at stake, this Court has repeatedly rejected

administrative cost as a justification for deprivation of individual liberties. *See Bounds v. Smith*, 430 U.S. 817, 8__ (1977). When it comes to detention, this Court has consistently held that deprivation of physical freedom is permissible only when Government has shown a significant need to detain, despite the administrative costs necessarily involved in doing so.

In *Schall v. Martin*, 467 U.S. 253(1984), for example, the Court considered New York's scheme for the pre-trial detention of accused juvenile delinquents. Under that scheme, detention was "strictly limited in time." *Id.* at 269. A juvenile arrested for a particularly serious crime could be held no more than 17 days before having a full-blown juvenile trial; those arrested for lesser crimes could be detained no more than six days before having a trial. *Id.* at 270.

Even within these strict time limits, the juvenile was entitled to multiple due process protections. The juvenile had to be brought before a family court judge no later than 72 hours after arrest. *Id.* at 258 n.6. No more than three days after this initial appearance, a detainee was entitled to a "probable-cause hearing," *id.* at 269-70, at which the juvenile was entitled to the assistance of counsel, to call witnesses, and to offer evidence in his own behalf. *Id.* at 277. If the juvenile court found probable cause, it had to again decide whether continued detention was necessary to "protect the community from crime." *Id.* at 264.

In *United States v. Salerno*, 481 U.S. 739 (1987), this Court upheld detention without bail of dangerous criminal defendants under the Bail Reform Act. There again the law "carefully limit[ed] the circumstances under which detention may be sought to the most monstrous of crimes." *Id.* at 747. The arrestee was entitled to a prompt, "full-blown adversary hearing" at which the government had to convince a neutral decisionmaker that the arrestee

presented an identified and articulable threat to an individual or the community. *Id.* at 750.[18]

Most recently, in *Foucha v. Louisiana*, _ U.S._, 60 U.S.L.W. 4359 (1992), this Court struck down a state statute that placed the burden of proof on an insanity acquittee to show that he or she was not dangerous in order to gain release from a state mental institution. Under the state scheme the acquittee had received a complete criminal trial before commitment, *id.* at 4360; and was entitled to a multiple, periodic hearings to determine his present sanity and dangerousness, *id.* at 4369 (Thomas, J., dissenting). The Court held that the state must nonetheless assume the burden of proving cause for continued confinement in each case by clear and convincing evidence. *Id.* at 4363.

The detention here at issue, in contrast, involves at least two major steps beyond anything yet approved in this Court's jurisprudence:

First, detention under the regulation at issue is unrestricted in time. A child incarcerated under a INS's policy is subject to *indefinite* detention. Nothing in INS regulations requires that a deportation hearing be completed or an individual released from detention within any specific time. *See Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (person charged with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time).

Second, the INS would detain children indefinitely without the slightest procedural protection. Children are *automatically* incarcerated "for their own good" without the INS's ever having to convince a neutral

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[18] Further, the maximum length of pretrial detention was "limited by the stringent time limitations of the Speedy Trial Act." *Id.* at 747.

or detached decisionmaker that such detention is in a child's best interests.

These precedents leave no doubt but that the INS's interest in refusing to determine need for detention is simply not enough to override the strong constitutional protection to which personal liberty is entitled under our Constitution. The record, moreover, demonstrates that the INS *in fact* possesses ample resources and expertise to bring its detention scheme up to constitutional norms. As Judge Rymer points out,

> While the INS argues that it lacks resources to conduct home studies, there is no substantial indication that some investigation or opportunity for independent, albeit informal consideration of the juvenile's circumstances in relation to the adult's agreement to care for her is impractical or financially or administratively infeasible.

App. 48a-49a (Rymer, J., concurring in part and dissenting in part). For multiple reasons, the INS's unwillingness to evaluate cause for detention is a poor excuse for its wholesale institutionalization of children.

First, *jailing* children places an enormous drain on administrative resources. The INS conceded having made *no* effort to determine whether it would be more cost-effective to evaluate available adults than it is to detain children at taxpayers' expense. 79 CR 1669-70. The agency admitted that detaining a child costs the U.S. taxpayer as much as $100.00 per day per child. 159 CR 76. As the brief *amicus curiae* of shelter service providers points out, a child can be cared for in a licensed, approved shelter or foster home for between $29 and $35 per day, a fraction of what it now costs the INS to keep a child in a custodial facility.

Brief *Amicus Curiae* of U.S. Catholic Conference, *et al.*, at 16 n.1.

Second, the uncontroverted record shows that under both its pre-1984 policy and the district court's order, the INS has for years released minors to responsible adults and shelter programs without incident. No report has ever been made of a child's being harmed or neglected. [19]

Third, screening potential custodians is simply not the impossible task the INS makes it out to be. The uncontroverted record establishes that probate courts screen guardians through a brief interview and application. The INS fails to explain why it cannot manage similar procedures to save respondent children from months of open-ended confinement.

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[19] Indeed, *the INS is an investigative agency* and as such routinely evaluates the character and moral fitness of individuals seeking immigration benefits or citizenship. For example, the INS routinely passes on the bona fides of marriages: that is, whether a husband and wife have entered into marriage for conventional reasons or solely to confer an immigration benefit. 8 U.S.C. § 1154(c). In adjudicating tens of thousands of applications for adjustment of status, the INS must daily determine, *inter alia*, that he or she does not "have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, 8 U.S.C. § 1182(a)(1)(A)(ii)(I); is not "a drug abuser or addict," 8 U.S.C. § 1182(a)(1)(A)(iii); is not coming to the United States to engage in "any ... unlawful activity," 8 U.S.C. § 1182(a)(3)(A)(ii); and is not "likely at any time to become a public charge," 8 U.S.C. § 1182(a)(4). Similarly, the INS routinely determines whether applicants for suspension of deportation are persons "of good moral character." 8 U.S.C. § 1254. The INS offers *no* reason why these investigative powers are suddenly inadequate to evaluate potential custodians for children who would otherwise spend open-ended terms in its detention camps.

The INS is now, in fact, successfully pursuing just such a procedure under the district court's order.[20]

Fourth, although insisting that it "is the only federal agency with responsibility for caring for these juveniles," Pet.Brf. at 31, the INS makes *no* effort to turn children over to state or local government authorities, authorities the agency admits have the resources, expertise, and obligation to care for unaccompanied children. *Compare* 18 U.S.C. § 5032 (general policy of federal government to defer to state and local authorities in matters concerning juvenile delinquency).

Finally, if the INS cannot manage to screen potential custodians, *how can it possibly expect to care for the physical, emotional, spiritual and developmental needs of children during months of open-ended confinement?* As has been seen, the uncontroverted record establishes that the INS has proved more successful at evaluating potential custodians than it has been at institutionalizing children. As the brief *amicus curiae* of advocates for immigrant and refugee children points out, conditions for children in open-ended INS detention remain substandard.

In the final analysis, the INS's categorical refusal to make any inquiry into whether release to an extended family member or other reputable caretaker

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[20] The INS's past success in evaluating potential custodians is not surprising. As the INS points out, a good portion of the minors it arrests are males between sixteen and seventeen years old. Pet.Brf. at 9 n.12. The INS's notion that it would have to perform full-blown home studies to protect such minors against abuse by a godmother or church group is both counterintuitive and unsupported by the record. Releasing younger children, of course, presents greater risks, but then so does detaining them. These examples simply underscore the irrationality of a blanket approach to detaining minors.

would pose any danger to the child or the community undercuts its professed *parens patriae* interest. The INS purports to ensure the welfare of children by routine detention, but such detention—without trial, without even a mandatory custody hearing, and without *any* factual showing that detention is necessary to ensure respondents' welfare—serves only to aid the INS in making easy, blanket judgments concerning custodians. This purpose is simply inconsistent with any proper *parens patriae* interest.

C Plenary authority to regulate immigration does not imbue the INS with special powers to impose open-ended detention solely for child welfare purposes.

The foregoing has shown that automatic, open-ended detention simply cannot withstand the exacting constitutional scrutiny to which governmental deprivations of physical liberty must be subjected. The INS seeks to escape this result by demanding "special judicial deference" that they contend must be employed whenever any INS policy is at issue, whether or not the policy actually reflects immigration-related concerns. Such a sweeping assertion is flatly incorrect.

To begin with, respondents do not dispute the principle of judicial deference to Congress's substantive immigration policies. Indeed, respondents' wholeheartedly agree with *Congress's* declared policy to minimize the detention of children, 18 U.S.C. § 1354, and wish the INS shared that view.[21]

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[21] Of course, whatever authority the INS enjoys to regulate immigration is derivative from and subordinate to that of Congress. *See generally Abourezk v. Reagan*, 785 F.2d 1043, 1061

Further, the lack of relationship between targeting children for open-ended detention and immigration is undisputed. Petitioners flatly concede that the policy at issue has nothing to do with our country's immigration policy in general, with the deportation process in particular, or even with children's status as alleged aliens. In fact, children's status as aliens is wholly incidental to the deprivation to which they are being subjected— children are refused release only for purported child-welfare reasons, not because they are suspected of being in the country illegally or of being a threat to the public or the national security. Pet. Br. at 27. Such individualized determinations are never reached under the INS's detention scheme.

The principle that not every policy directed to non-citizens is entitled to special judicial deference is amply illustrated in *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), where this Court invalidated a federal regulation promulgated by the Civil Service Commission that excluded aliens from most federal government employment. Even though the rule was directed at aliens and was defended as furthering immigration and foreign policy goals, the Court struck it down because the goals were not shown to underlie those restrictions. *Id.* at 104. The Court refused to apply the deferential review requested by the Government. *Id.* at 104-05.

Hampton demonstrates that merely affecting immigration or targeting immigrants is not sufficient to bring a federal regulation or policy within the ambit of the "special judicial deference" rule that the INS suggests saves its otherwise unconstitutional policy. Where, as here, a policy is demonstrably and admittedly *unrelated* to

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(D.C. Cir. 1986), *aff'd* 484 U.S. 1 (1987); *Haitian Refugee Ctr. v. Civiletti*, 503 F.Supp. 442, 452-53 (S.D. Fla. 1980), *aff'd as modified*, 676 F.2d 1023 (5th Cir. 1982) (collecting authorities).

immigration, plenary immigration authority does nothing to save an otherwise impermissible provision.[22]

The case law on which petitioners rely is not to the contrary. *Mathews v. Diaz*, 426 U.S. 67 (1976), for example, concerned an express *congressional* policy providing certain medicare "benefits to some aliens but not to others ...." *Id.* at 80. The Court upheld the policy, stating that it was "unquestionably reasonable ... to make an alien's eligibility depend upon both the character [permanent resident status] and the duration [5 years] of his residency." *Id.* at 83. Thus, in *Diaz*, the plaintiffs' status as *aliens* was not only a consideration underlying the policy, it was the primary consideration: Congress made a decision that certain aliens should not "share in the bounty," *id.* at 80, precisely because they were not as deserving as citizens and long-term permanent resident aliens.[23] Here, the fact that respondents are *allegedly* aliens has nothing to do with INS' decision to detain them; only respondents status as *children* is taken into account.

More importantly, *Diaz* involved entitlement to welfare benefits, something that has traditionally received only minimal constitutional protection. *Id.* at 83-84. Indeed, *Diaz* would likely have been decided no differently had the plaintiffs in that case been citizens. *Id.*. at 84 n.23 (*citing Weinberger v. Salfi*, 422 U.S. 749, 768 (1975)). The remaining cases petitioners cite similarly fail to support their claim for judicial deference to a purely child-welfare policy.[24]

The authority of the United States Congress to determine who shall enter and remain in the country is, of course, the ultimate political choice in the immigration field and at the heart of immigration decisionmaking to which courts have traditionally deferred. Whether or not the plenary immigration authority extends to other immigration-related concerns, it is clear that it cannot be distended to

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22 The INS tries to distinguish Hampton by arguing that in that case the "wrong agency" was attempting to exercise plenary immigration authority. Petition at 17 n.15. In *Hampton* the Civil Service Commission *was* the "wrong agency" to be promulgating immigration policy. So too, is the INS the "wrong agency" to be promulgating child welfare policy at odds with what Congress itself has declared.

23 The policy at issue in *Diaz*, moreover, was clearly related to global immigration and foreign policy concerns. As the *Diaz* Court pointed out, "[a]ppellees ... are but two of over 440,000 Cuban refugees ... [a]nd the Cuban parolees are but one of several categories of aliens who have been admitted in order to make a humane response to ... an international political situation." *Id.* at 81. In this case the INS has never claimed that its policy was influenced by even limited immigration-related objectives, much less such expansive geopolitical concerns.

24 Indeed, those very cases suggest the boundaries of the federal government's plenary authority over immigration, since the policies challenged were directly and explicitly related to "which classes of aliens may lawfully enter the country," *Fiallo v. Bell*, 430 U.S. 787, 794 (1977), and which "shall be allowed to stay," *Harisiades v. Shaughnessy*, 342 U.S. 580, 597 (1951).

In *Galvan v. Press*, 347 U.S. 522, 525 (1954), petitioner challenged the validity of the Internal Security Act of 1950, which "required deportation of any alien who ... was a 'member' of the Communist Party." *Harisiades v. Shaughnessy*, 342 U.S. 581 (1952), addressed "whether the United States constitutionally may deport a legally resident alien because of membership in the Communist Party." *Fiallo v. Bell*, 430 U.S. 787, 790 (1977), involved the rights of "unwed natural fathers and their illegitimate offspring" to "special immigration preference" to enter the United States. And, in *Kleindienst v. Mandel*, 408 U.S. 753, 755 (1972), the Court upheld the Attorney General's discretion to exclude an advocate of the "doctrines of world communism."

shield a purely child-welfare policy, an agency policy at odds with what Congress itself has embraced. For its part, the INS suggests no way in which its regulatory authority is logically bounded. Under the INS's view, it could justify virtually every violation of the Constitution by simply pointing out that it is the agency that regulates immigration. Here, the policy does not involve core immigration concerns, or even immigration-related concerns at all, only a child-welfare policy haphazardly arrived at by the INS. Special deference is wholly unwarranted.

In conclusion, petitioners' claim that their policy protects children is illusory. The INS cannot plausibly claim that it is acting to protect the respondent children's safety and welfare, and at the same time refuse to make any factual determination that open-ended confinement is at all necessary. In all other cases in which this Court has found detention prior to trial or without trial legitimate, detention was imposed only upon a due process determination that detention was necessary to serve the government interest at stake. Thus, in *Salerno*, the Court pointed out that the pretrial detention policy at issue was not a "scattershot attempt" to detain persons who might be dangerous, but instead required the government "to convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person," *Salerno*, 481 U.S. at 750. If the INS would detain children to protect them, it must *determine* that such detention is necessary.

But in reality, the INS's policy has nothing to do with protecting children, but with saving the INS the administrative inconvenience of determining whether detention is at all necessary. The INS attempts to justify its refusal to determine cause for

detention by professing a lack the expertise and resources. Such grounds have never been deemed sufficient to justify open-ended deprivation of personal liberty. In any event, the petitioners' ostensible lack of expertise and resources is both illogical and thoroughly inconsistent with the uncontroverted record. The INS purports to have the expertise and resources to undertake the far more difficult task of caring for children during months of open-ended confinement, yet cannot manage the screening procedures it for years has employed with unbroken success. On this record, the INS's case for the automatic, open-ended detention of children cannot possibly pass constitutional muster.

II THE DISTRICT COURT'S ORDER SHOULD BE AFFIRMED IN ITS ENTIRETY AS ACCORDING CHILDREN MINIMAL PROCEDURAL PROTECTION AGAINST THE NEEDLESS DEPRIVATION OF PERSONAL LIBERTY.

It has long been settled that "[t]he Fifth Amendment ... protects every [alien within the jurisdiction of the United States] from deprivation of life, liberty, or property without due process of law. ... Even one whose presence in this country is unlawful, involuntary, or transitory, is entitled to that constitutional protection." *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (citations omitted).[25]

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[25] It is, of course, within the special competence of the judiciary to determine what process is constitutionally due aliens within the United States. *Woodby v. INS*, 385 U.S. 276, 284 (1966) (constitutionality of deportation procedures "the kind of question which has traditionally been left to the judiciary to resolve..."). *See also Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by

Concurring and dissenting below, Judge Rymer points out that "the district court's order may be seen as wholly procedural and could be affirmed on procedural grounds." App. at 43a-44a. The essence of that order is that the INS must provide *some* procedure by which to determine that detention would actually be in a child's best interests if it is to jail that child indefinitely. The district court's order should be affirmed as according children minimal procedural protection against the needless deprivation of their personal liberty.

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court formulated the test by which minimum procedural requirements are determined:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of the safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. Application of this test fully supports the district court's modest order.

1. The first element of the *Mathews* due process formulation looks to the private interest affected by official action. As has been seen, children's right to personal liberty is fundamental, and as such is entitled to the utmost procedural protection. The importance of the right here at stake militates with unparalleled force in support of adequate procedures for the protection of respondents' personal liberty.

2. The second *Mathews* element also weighs decidedly in support of the district court's order: in the vast majority of cases where the INS would deny release, minors can be released safely to reputable adults or shelter care programs not appearing on the agency's short list.

The record is dispositive. For years the INS has released children to responsible adults and shelter-care programs without incident. *For almost three years now, responsible adults and youth shelters have cared for scores of children who would have languished in INS jails but for the district court's order. Had the INS been permitted to enforce its regulation, hundreds of children would have been locked up in order to protect none of them.* Beyond any doubt, the INS's blanket approach to detaining children needlessly deprives the vast majority of those to whom it is applied of their fundamental right to personal liberty. This degree of erroneous deprivation is more than mere risk— it is a guarantee of needless incarceration.

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the Fifth and Fourteenth Amendments"); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 598-99 (1953); *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950) ("we have extended to the person and property of resident aliens important constitutional guarantees—such as the due process of law"); *U.S. v. Mendoza-Lopez*, 481 U.S. 828, 837-41 (1987) (Court reviews deportation procedures under Due Process Clause for availability of "effective judicial review").

Plasencia v. Landon, 459 U.S. 21 (1984), is not to the contrary. Indeed, that case was remanded to the court of appeals to consider Plasencia's claim under the three-part *Mathews v. Eldridge* test. In any event, *Plasencia* involved procedural protections due an alien seeking to *enter* the country. In the *exclusion* context it is well-settled that the political branches have far greater latitude than than when they seek to deprive a person within the United States of basic constitutional rights. *See, e.g., United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

The INS, of course, must ultimately concede that its existing procedures are not intended to save a child from being erroneously deprived of personal liberty. Pet.Brf. at 34-35. True to form, INS regulations require *no* review—by district director, immigration judge, or anyone else—of the factual case for restrictions on a child's release. Judge Rymer described this procedural vacuum in stark terms:

> *INS regulations provide no opportunity for the reasoned consideration of an alien juvenile's release to the custody of a non-relative by a neutral hearing officer.* Nor is there any provision for a prompt hearing on a § 242.24(b)(4) release. No findings or reasons are required. Nothing in the regulations provides the unaccompanied detainee any help, whether from counsel, a parent or guardian, or anyone else. Similarly, the regulation makes no provision for appointing a guardian if no family member comes forward. There is no analogue to a pretrial services report, however cursory. ... Although not entirely clear where the burden of proof resides, it has not clearly been imposed on the government. *And there is no limit on when the deportation hearing must be held, or put another way, how long the minor may be detained.* In short, there is no ordered structure for resolving custodial status when no relative steps up to the plate but an unrelated adult is able and willing to do so. ...
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> For all that appears from the regulations, the juvenile without parent, guardian or relative is left in procedural limbo. Second, there is no provision for reasoned consideration by a neutral hearing officer. Time limits and impartiality are basic safeguards against arbitrary action. ... To omit both increases the risk that the juvenile for whom detention is not needed and for whom there is a prospective adult willing to assume care and assure appearance will not be released because of inattention, inadvertence or intransigence.

App. 48a-49a (Rymer, J., concurring in part and dissenting in part) (emphasis added; citations omitted).

The INS responds that Judge Rymer simply misses the point. According to the INS, it has broadly declared who is and who is not an appropriate custodian; therefore whether detention actually protects any given child is *irrelevant*. *Id.* at 35. The pertinent inquiry, the agency suggests, is whether an available custodian is of an approved type. *Id.*

The faults with this approach are several. First, the agency's policy itself provides that children may be released to custodians not appearing on its approved list under "unusual and compelling" circumstances, yet sets up no procedure by which a child may demonstrate entitlement to such release.

More importantly, as the "interest" prongs of the *Mathews* test suggest, procedural due process looks to the governmental and private purposes served by a procedural determination. For example, in *Addington v. Texas*, 441 U.S. 418, 425 (1979), this Court considered the standard of proof required in a civil proceeding to commit an individual involuntarily. The Court held that "civil commitment for any purpose" must be supported by clear and convincing evidence of individual dangerousness. *Id.* at 425. In so doing, this Court pointed out that it is the state's legitimate interest in *protecting* such individuals and the community, not its interest in avoiding administrative inconvenience, that is germane to the due process inquiry:

> The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional

> disorders to care for themselves ... [H]owever, *the state has no interest in confining individuals involuntarily if they are not mentally ill or if they do not pose some danger to themselves or others.*

Id. at 426 (emphasis added).

As in *Addington*, the Government has *no* interest in detaining a child who could be released safely. Indeed, the INS pins its case for detaining children solely on the strength of its interest in *protecting* them. Similarly, in the Juvenile Justice and Delinquency Act, Congress makes clear that minors should be detained only if a magistrate "determines, after hearing, ... that detention of such juvenile is required to ... insure his safety or that of others." 18 U.S.C. § 5034. Both the INS and Congress, therefore, eschew any interest in detaining children who could be released safely. To the contrary, Congress has made abundantly clear its interest in minimizing the detention of minors. Juvenile Justice and Delinquency Prevention Act of 1974, Pub.L. 93-415, 88 Stat. 1109, *codified at* 42 U.S.C. §§ 5631 *et seq.*

In short, the interest prongs of the *Mathews* balancing test—here personal liberty and the need to curtail that liberty in a child's best interests—and the INS's and Congress's disavowal of any desire to detain minors who could be safely released, properly focus the due process inquiry. Existing procedures must be evaluated by reference to those interests: that is, by asking whether INS procedures are adequate to prevent needless confinement.

3. Turning to the third prong of the *Mathews* test, it may be readily appreciated that requiring the INS to determine actual cause for detention is a valuable, indeed indispensable, procedural protection. In *Foucha v. Louisiana*, _ U.S. _, 60 U.S.L.W. 4359 (1992), this Court held that *the state* must prove by

clear and convincing evidence its case for continuing to detain an insanity acquittee in a mental institution once that individual is no longer insane:

> Under the state statute, Foucha is not now entitled to an adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community. Indeed, *the State need prove nothing to justify continued detention, for the statute places the burden on the detainee to prove that he is not dangerous.* At the hearing which ended with Foucha's recommittal, no doctor or any other person testified positively that in his opinion Foucha would be a danger to the community, let alone gave the basis for such an opinion. ... This, under the Louisiana statute, was enough to defeat Foucha's interest in physical liberty. It is not enough to defeat Foucha's liberty interest under the Constitution in being freed from indefinite confinement in a mental facility.

60 U.S.L.W. at 4363 (emphasis supplied).

Foucha thus affirms the maxim, "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). If detention is to be carefully limited, the Constitution obliges *government* to show in the first instance adequate cause for depriving an individual of physical liberty, and it must do so before a neutral and detached decisionmaker.

Regardless of whether incarceration is nominally civil or criminal, due process has always included independent review of the initial decision to detain. In cases involving involuntary commitment of children, this Court has specifically required review

by a neutral and detached trier-of-fact. *E.g.*, *Parham v. J.R.*, 442 U.S. 584, 606-07 (1979).

In stark contrast to its approach to detention, the INS argues that children can be expected to ask for a hearing to review restrictions on their liberty. Now leaving minors to fend for themselves, the INS argues that forcing a child to seek a "bond redetermination" hearing is all the process that is due. In *Doe v. Gallinot*, 657 F.2d 1017 (9th Cir. 1981), the state similarly argued that mental patients were free to test their confinement through habeas corpus proceedings and that automatic administrative review of short-term custody was constitutionally unnecessary. The court of appeals made the obvious point:

> No matter how elaborate and accurate the habeas corpus proceedings ... may be once undertaken, *their protection is illusory when a large segment of the protected class cannot realistically be expected to set the proceedings into motion in the first place*. It is the state, after all, which must ultimately justify depriving a person of a protected liberty interest by determining that good cause exists for the deprivation.

Id. at 1023 (emphasis added).

Like the mentally disabled, children are simply not protected by "on-request" procedures, procedures they cannot realistically be expected to set into motion in the first place. Not surprisingly, the INS is utterly alone in putting the onus on children to ask for a custody hearing: juvenile justice standards uniformly require prompt independent review of the grounds for a child's detention *without* request. *E.g.*, 18 U.S.C. § 5033 ("The [arrested] juvenile shall be taken before a magistrate forthwith. In no event shall the juvenile be detained for longer than a reasonable period of time before being brought before a

magistrate"); *see also Schall v. Martin*, 467 U.S. 253, 255 and n.3 (1984).

Sadly, the INS simply sheds its self-professed *parens patriae* obligation at the jailhouse door. Although the agency defends its detaining children as reflecting an obligation to care for them, it leaves a youngster on his or her own when it comes to invoking procedural protections against superfluous confinement. *E.g.*, Petition for Certiorari at 23 ("[A] child is adequately protected by his right to seek a hearing before the immigration judge"). The Due Process Clause obviously requires better of our Government.

The INS alternatively suggests that state guardianships provide procedure enough to save a child from needless confinement. As the record establishes, however, not only are children in INS detention simply ineligible for guardianships, they cannot reasonably be expected to invoke such procedures from the confines of remote INS detention facilities. Under such conditions, state guardianship procedures are appropriately seen as protecting an *adult's* right to become a guardian, not a *child's* right to freedom from institutional restraint. After all, it is the INS that detains a child, and it is the INS, not state officials, that must meet the procedural requirements of the due process clause to justify that detention. The INS's passing the procedural buck is surely not due process.

4. The final element of the *Mathews* balancing test looks to the fiscal and administrative burdens that additional procedures would entail. The INS excuses its failure to afford children procedural protection against needless confinement by pleading incompetence to perform "home studies" or to otherwise evaluate custodians not on its approved

list. As has been seen, the uncontroverted record shows this justification to be completely untenable.[26]

Nor does the requirement that, in the case of a minor, the agency provide a bond redetermination hearing to a child facing prolonged detention add significantly to the INS's administrative burden. The INS began holding custody hearings for minors on June 13, 1988. Plaintiffs'/Appellees' Supplemental Brief on Rehearing En Banc, Appendix 3.[27] From that time until September 26, 1989, custody hearings were held for only 416 minors nationwide— *less than one hearing per day*. *Id*., Appendix 1 at ¶¶ 4 and 9. Forty-five percent of these were held as part of a bond redetermination, which under its own regulations the agency has to provide regardless. *Id*. at ¶ 9. Many of the remaining custody hearings were held jointly with deportation proceedings, which the INA obliges the agency to provide regardless. Appendix 3 at 2.

As the court of appeals pointed out, "The only new requirements [under the district court's order]... are that, if the alien is a child, such a hearing must be held regardless of whether the alien requests it, and the determination at the hearing must include an inquiry into whether any non-relative who offers to take custody represents a danger to the child's well being." App. 25a. The INS could not possibly be

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[26] See pp. 25 - 28, *ante*.

[27] The referenced documents were disclosed pursuant to the Freedom of Information Act by the Executive Office of Immigration Review, an entity within the United States Department of Justice. Appendix 4. Their accuracy can be readily verified from the agency's official records, a source "whose accuracy cannot reasonably be questioned." Accordingly, they should be judicially noticed. *Massachusetts v. Westcott*, 431 U.S. 322, 323 n.2 (1977).

burdened by providing children such minimal procedural consideration.

The *Mathews* due process balancing test, therefore, leaves no doubt but that current INS "procedures" are inadequate to the task of ensuring that children are not needlessly incarcerated. As this Court has held before,

> Procedure by presumption is always cheaper and easier than individualized determination. But where, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child.

Stanley v. Illinois, 405 U.S. 645, 656-57 (1972). *See also Weinberger v. Salfi*, 422 U.S. 749, 785 (1975) (individualized determinations required where "affirmative Government action ... seriously curtails important liberties cognizable under the Constitution").

In sum, precedents delineating the procedures due individuals deprived of physical liberty prior to trial unquestionably support the district court's order. *Mathew*'s general test for due process confirms this result. That the INS must exercise *informed* discretion, *i.e.*, that it must have demonstrable cause to detain, is a constitutional and, as will be seen, a *statutory* prerequisite to the indefinite incarceration of children.

III THE INS'S BLANKET DETENTION OF CHILDREN EXCEEDS ITS AUTHORITY UNDER THE INA.

The foregoing has shown that the INS's detaining children without regard to whether such treatment is

at all necessary is unconstitutional.[28] From the outset of this cause, respondents have consistently argued that the INA can and should be reasonably construed so as to avoid these constitutional problems. App. 80a. So construed, the INS's blanket detention policy is not a valid exercise of the statutory discretion Congress conferred upon it. Although the *en banc* court of appeals did not address this statutory claim, this Court can and should resolve this case in

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[28] In addition to denying due process, the INS's detention practices also discriminate in two ways against respondent children in arguable violation of the equal protection guarantee of the fifth amendment.

First, the INS's regulation divides children arrested for possible deportation into two classes: (1) children whose close blood relatives come for them; and (2) children for whom no such relative appears but for whom an extended family member or other responsible adult is willing to appear. As has been seen, such a classification lacks any rational connection to the likelihood that a child will be harmed or neglected following release. In any event, discrimination in providing basic procedural protection against needless "protective" incarceration cannot withstand the heightened scrutiny this Court has applied in reviewing any other deprivation of personal liberty. "Freedom from physical restraint being a fundamental right, the State must have a particularly convincing reason ... for such discrimination..." Foucha v. Louisiana, _ U.S. _, 60 U.S.L.W. 4359, 4363 (1992).

Second, the federal government generally endeavors to ensure that a given child—even if that child is an alien—is not needlessly incarcerated. 18 U.S.C. § 5034 (requiring hearing before federal magistrate to determine whether child should released). The Government reserves blanket "protective" detention for minors taken into custody by the INS. Because the INS justifies the automatic detention of children solely as a means to protect them, the underlying assumption is that children are more likely to be harmed when released to extended family members or child welfare programs because they have been arrested for deportation rather than delinquency. Such a classification is palpably irrational.

respondent's favor on statutory grounds alone. *See Jean v. Nelson*, 472 U.S. 846, 854 (1985).

The INS's authority to detain suspected deportable aliens is contained in 8 U.S.C. § 1252. As this Court has observed, § 1252 places no express limits on the Attorney General's authority to detain because Congress deemed general rules about who should or shouldn't be detained unworkable. *Carlson v. Landon*, 342 U.S. 524, 538 (1952) (decision to detain must be made on facts of individual case because "purpose to injure could not be imputed generally to all aliens subject to deportation...").

In *Immigration and Naturalization Service v. National Center for Immigrants' Rights, Inc.*, __ U.S. __, 112 S.Ct. 551 (1991), the Court reaffirmed the agency's statutory obligation to *exercise* discretion to detain on the facts of an individual case. In *National Center*, the INS argued that it had authority to condition a deportable alien's release on bond on his or her refraining from unauthorized employment. This Court upheld the regulation only because there the INS made "'an initial, informal determination whether the alien holds some status that makes work 'authorized.'" 112 S.Ct. at 559.

> We agree that the lawful exercise of the Attorney General's discretion to impose a no-work condition under § 1252(a) requires some level of individualized determination. Indeed *in the absence of such judgments, the legitimate exercise of discretion is impossible in this context*. ...

112 S.Ct. at 558-59 (emphasis supplied).

In contrast to *National Center*, the INS here argues that it is empowered to *automatically* detain children without any individualized exercise of discretion. This is expressly inconsistent with the principle of informed discretion articulated in *Carlson* and

National Center, yet the agency offers no reason to abandon this principle in this case. To the contrary, this case presents compelling reasons for reaffirming the Court's prior construction of § 1252.

"A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score...." *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933); *accord Public Citizen v. U.S. Dept. of Justice*, _ U.S. _, 109 S.Ct. 2558, 2566 (1989). In construing a statute that could impair an important constitutional right, this Court has placed special emphasis on this axiom of statutory construction, holding that there must be an "'*affirmative* intention of the Congress clearly expressed'" that such is the legislature's intent. *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 506, (1979) (emphasis supplied).

Under our Constitution, "to the extent consistent with orderly governmental administration ... important choices of social policy [must be] made by Congress, the branch of our government most responsive to the popular will..." *Industrial Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring). This principle has repeatedly caused this Court to give "narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional." *Mistretta v. U.S.*, 488 U.S. 361, 109 S.Ct. 647, 655 n.7 (1989) (collecting cases).

Construing § 1252 as requiring an individualized determination of cause to detain is the only reading which is consistent with the important policy choices Congress has made in the area of child welfare. After all, if Congress thought children should be detained indefinitely for want of an available close blood relative it would have no difficulty in making a hard-and-fast rule to that effect.

In conclusion, this Court has consistently read § 1252 as requiring that the INS exercise individualized discretion where it would detain persons it has not yet shown are either aliens or deportable. This result is faithful to Congress's intent that detention under the INA be applied flexibly in the public interest. The flexibility Congress sought to foster can only be preserved if the INS is required to exercise its discretion on the merits of an individual case. Reading § 1252 as requiring the INS to determine whether detention is in fact warranted for a given child is consistent with this Court's prior decisions, and this Nation's historic regard for personal liberty. For its part, the INS offers no sound reason for any other result.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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